Supreme Court, U. S.
FILED
SEP 26 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-511

LO-JI SALES, INC.,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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LO-JI SALES, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

OPINIONS BELOW

The petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the New York Court of Appeals entered in the above case on July 5, 1978.

JURISDICTION

The State of New York, County of Orange Local Criminal Court, Town of Wayayanda's judgment and opinion was entered on November 13, 1976. Copy of said opinion is set forth in Appendix A. The

order of the Appellate Term was entered on April 25, 1978. Copy of said opinion is set forth in Appendix B. An application for leave to appeal was timely filed and denied by the New York Court of Appeals on July 5, 1978. Copy of said denial is set forth in Appendix C. This Court's jurisdiction is invoked under Title 28 United States Code 1257(3).

QUESTIONS PRESENTED

1. Does the search of a bookstore and the seizure of 790 copies of books, magazines and films presumptively protected by the First Amendment, conducted and effected prior to the issuance of a warrant which specifically names the materials to be seized, violate the First, Fourth and Fourteenth Amendments of the United States Constitution?

2. Does the leafing through a book or magazine and the viewing of a small part of a film by a judge enable the judge to focus searchingly upon the obscenity of the work as a whole, and thus constitute sufficient prior judicial scrutiny of expression presumptively protected by the First Amendment to warrant the seizure of such material from a bookstore?

3. Does the seizure of all copies of a film, book, or magazine determined by a judge, ex parte, to be obscene, thereby totally suppressing the dissemination of such presumptively protected expression prior to an adversary hearing and a final adjudication of its obscenity vel non, constitute a total prior restraint and violate the First, Fourth and Fourteenth Amendments?

4. Can a signed incomplete search warrant which is completed by a policeman after the search and seizure of books, magazines and films from a bookstore, validate such search and seizure nunc pro tunc?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution, as well as section 235.05(1) of the New York State Penal Law (McKinney's Consolidated Laws of New York, 1967 ed., as amended by New York Law 1969, p.76) are set forth in Appendix D hereto.

STATEMENT OF THE CASE

On June 20, 1976 a police officer entered the store of the petitioner and purchased two 8 millimeter reels of motion picture film entitled "Linda and Duke" and "Four for Dinner". The police, believing these films to be obscene and typical of other films and magazines sold in the petitioner's bookstore, submitted an affidavit to Judge John O'Connor requesting that the Judge accompany the police officers in the execution of a warrant to be issued for the seizure of "additional matter present in the aforedescribed premises possessed in violation of the law and therefore subject to seizure."

It was further requested in the affidavit that the court issue a search warrant for the seizure of all copies of the two films already purchased by the police officer and for "any other material that

the court may independently determine upon viewing to be possessed in violation of Article 235 of the Penal Law."

Several days later, on June 25, 1976, a massive raid and search was conducted at the premises by the Judge, various officials of the District Attorney's Office and over a dozen police officers.

The authority for the general search of the entire premises and seizure of a substantial portion of the inventory in the premises and projectors, much of which could not be scrutinized without the destruction of the heat-sealed cellophane wrapper totally enclosing each magazine and book, was an incomplete warrant merely listing the 2 films previously purchased by the aforementioned policeman. The search warrant, which was signed by Judge O'Connor, called for the seizure of all additional copies of the previously purchased films of June 20, 1976. Space was left on the incomplete search warrant for the insertion of the names of additional films, books and magazines.

Upon entry into the premises the clerk was arrested, all customers were expelled and the store was closed for further business. The Judge glanced through and at hundreds of films, books and magazines without reading or viewing any in its entirety. No more than a few seconds were spent looking at any one item. The Judge, on the basis of this rather superficial examination, told the accompanying police which films, books and magazines he considered obscene and all copies of such material were stacked for removal and then carted away.

When the police returned to headquarters with the seized materials, two typists were summoned and, outside the presence of Judge O'Connor, the search warrant was finally completed by the listing of all the items that were seized.

It cannot be overemphasized that most of the magazines in the store were wrapped in cellophane and could not be subjected to judicial scrutiny without the performance of a search and seizure, to wit, the tearing of the cellophane. When the raiders entered the store, closed it for business, arrested the clerk, and began their general search of the premises, there had been neither prior judicial scrutiny of the material mentioned in the subsequently completed warrant nor probable cause for the issuance of said warrant. Furthermore, there was never proper judicial scrutiny of the expressive material since the whole book rule requires that a work must be read, viewed and judged in its entirety before any determination of obscenity vel non may be made. Nothing could be clearer than the requirement that a work must be judged "as a whole", something that cannot be accomplished without a complete viewing of the entire work. See Roth v. United States, 354 U.S. 476 (1954) and Miller v. California, 413 U.S. 15 (1973).

Petitioner's motion to suppress was denied and, upon a plea of guilty, petitioner was convicted in the Criminal Court, Town of Wawayanda, County of Orange on three counts of obscenity in the second degree, promoting or possessing with intent to promote obscene material. The propriety of the search was upheld and the judgment of conviction sustained by

the Appellate Term and the Court of Appeals denied leave to appeal.

ARGUMENT

I

THE SEARCH OF A BOOKSTORE AND THE SEIZURE OF 790 COPIES OF BOOKS, MAGAZINES AND FILMS PRESUMPTIVELY PROTECTED BY THE FIRST AMENDMENT CONDUCTED AND EFFECTUATED PRIOR TO THE ISSUANCE OF A WARRANT WHICH SPECIFICALLY NAMES THE MATERIALS TO BE SEIZED VIOLATES THE FIRST, FOURTH AND FOURTEENTH AMENDMENTS.

Prior to the decision of the New York Court of Appeals in 1971 in the case of People v. Heller, 29 N.Y.2d 319, 327 N.Y.S.2d 628 (1971), it was the law in this jurisdiction as in most other jurisdictions throughout the United States that there could be no seizure of expressive material without a prior adversary hearing and judicial determination of the obscenity vel non of such material. Astro Cinema Corp. v. McKell, 422 F.2d 293 (1970); Bethview Amusement Corp. v. Cahn, 416 F.2d 410, cert. denied, 397 U.S. 920.

With the decision in Heller, it became the law of the State of New York that an evidentiary seizure of one copy of expressive material could be founded upon the prior judicial scrutiny of such material and determination of the obscenity thereof. The decision of the Court of Appeals was upheld by the United States Supreme Court in Heller v. New York, 413 U.S. 483 (1973) which upheld the New York procedure of prior judicial scrutiny as a

condition precedent to an evidentiary seizure of a single copy of expressive matter.

It must be strongly emphasized that the decision as to whether a particular item is obscene must not be taken too lightly. The seizure of material by law enforcement officers on grounds of obscenity potentially violates both the First and Fourth Amendments guaranteeing freedom of expression from unreasonable searches and seizures. Especially with regard to the First Amendment, not only are the rights of the owner of material involved, but also the rights of the potential audience are significantly at stake. The confluence of rights under the First and Fourth Amendments, and of rights on behalf of more than one person, was examined by the Supreme Court in Roaden v. Kentucky, 413 U.S. 496 (1973) where the Court was led to conclude that a "higher" than ordinary hurdle must be met in the issuance of warrants for the seizure of expressive matter, as opposed to non-expressive matter. The Court there stated:

> "The Fourth Amendment proscription against unreasonable . . . seizures, applicable to the States through the Fourteenth Amendment, must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material . . . the seizure of instruments of crime, such as a pistol or knife, or contraband or stolen goods or objects dangerous in themselves . . . are [sic] to be distinguished from quantities of books and movie

films when a court appraises the reasonableness of seizure under Fourth or Fourteenth Amendment standards." 413 U.S. at 501-502

The Court in Roaden, after reviewing earlier decisions, continued:

> "In each case the material seized fell arguably within First Amendment protection, and the taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition. Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theatre, presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is unreasonable in the light of values of freedom of expression." 413 U.S. at 504

Thus, Roaden clearly held that a seizure which effects a prior restraint within the meaning of the First Amendment constitutes an unreasonable search and seizure under the Fourth Amendment.

Where, as in the instant case, the pre-seizure adversary hearing is dispensed with, in deference to single copy evidence-gathering interests, the need to assure the constitutional sufficiency of the warrant becomes all the more urgent. In Marcus v. Search Warrant, 367 U.S. 717 (1961), the Supreme Court held that procedures followed under a state statute in the seizure of a mass of printed, allegedly obscene publications violated the First Amendment. The Court proceeded from the premise that the "power of search [can] be an instrument for the stifling of liberty of expression", 367 U.S. at 729. Although conceding that obscene material "is not within the area of constitutionally protected speech or press", 367 U.S. 730, the Court emphasized the requirement for "safeguards . . . to assure non-obscene material the constitutional protection to which it is entitled", 367 U.S. at 731. The Court concluded in Marcus that in order to avoid a prior restraint in violation of constitutional guarantees, there must be a "step in the procedure before seizure designed to focus searchingly on the question of obscenity." 367 U.S. at 732

The police officer and judge did not take the necessary constitutional precautions to insure a proper search and seizure of books, magazines and films sold in a bookstore. Such items are presumptively protected by the First Amendment and may not be seized unless certain

procedures are followed. The search and seizure in the instant case did not adhere to these procedures. The search and seizure in the petitioner's bookstore was based on an incomplete search warrant specifying only two films.

The Supreme Court in Heller allowed New York to forego the normally required adversary hearing before the search and seizure of expressive material because it was felt that if the prosecutor's case was based on one particular item, the use of an adversary hearing would allow a defendant to evade prosecution through the use of devious means; "that such films may be compact, readily transported for exhibition in other jurisdictions, easily destructible, and particularly susceptible to alteration by cutting and splicing critical parts of film." 413 at 493.

Here the search and seizure of multiple copies of literally hundreds of films, magazines and books forecloses the possibility that the defendant would or could resort to such means of evasion. Therefore this is not the kind of situation the Court in Heller had in mind when it created an exception to the general rule of requiring an adversary hearing prior to conducting a seizure of expressive material.

Furthermore, even if the exception of Heller did apply, which it does not, the judge in the instant case did not even fulfill the obligations of the alternate procedure set out in Heller, Judge O'Connor did not take the necessary steps to make a determination whether there was probable cause to seize the other 788 items in the petitioner's store that were not originally mentioned in the search warrant. The requirement that a neutral magistrate focus searchingly on the issue of obscenity prior to seizure was not met.

Clearly the way in which the search and seizure was carried out by the police, Judge O'Connor and members of the District Attorney's office violated the petitioner's First, Fourth and Fourteenth Amendment rights.

II

JUDGE O'CONNOR, WHILE CONDUCTING THE SEARCH AND SEIZURE OF THE PETITIONER'S BOOKSTORE, DID NOT COMPLY WITH THE "WHOLE BOOK RULE" IN DECIDING WHICH BOOKS, MAGAZINES AND FILMS WERE TO BE DECLARED OBSCENE AND HENCE SUBJECT TO SEIZURE.

Justice Brennan's decision in Roth v. United States, supra, rejected the view of the landmark English case Regina v. Hicklin, LR 3 QB 360 (1864) which held that materials could be declared obscene on the basis of isolated passages. Items presumptively protected by the First Amendment could now only be declared obscene if ". . . to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. at 489 (Emphasis supplied.)

This test has been interpreted to mean that a judge has a duty, before declaring a particular work obscene, to examine it as a complete entity. The

judge must not declare a movie obscene until he has sat through an entire showing. The judge must not declare a book obscene, until he has read the book in its entirety. If the judge fails to make such an exacting scrutiny, he will run the risk that a noteworthy book, magazine or movie will be suppressed merely because of the author's desire to include in his work a detailed discussion of the sexual aspects of the topic at hand. This stringent test has been continued by Miller v. California, supra.

This is not a case such as Heller, supra, where a judge lawfully entered a theater, took his place in the audience, viewed the entire film, determined its obscenity vel non, and issued a warrant for the seizure of one copy of the film as evidence to be used in connection with the simultaneous arrest of its exhibitor.

In the instant case, the judge during the course of the search and seizure declared over seven hundred items obscene in the space of a few hours. Obviously he did not have time to give a proper examination to any of the items. At best the judge could only give an item a fleeting, cursory examination. This procedure of evaluation in no way satisfies the requirements of Miller and Roth.

III

THE POLICE BY SEIZING ALL AVAILABLE COPIES OF ALL BOOKS, MAGAZINES, AND FILMS OWNED BY THE PETITIONER HAVE CONDUCTED A SUPPRESSIVE SEARCH EFFECTING A TOTAL RESTRAINT PRIOR TO A FINAL DETERMINATION OF OBSCENITY.

The Supreme Court in Heller v. New York, supra, made it clear that prior judicial scrutiny could not support a suppressive search, i.e. a seizure of more than one copy of a work. The Court stated on page 492:

> "But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film. If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. In addition, on a showing to the Trial Court that other copies of the film are not available to the

> exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise the film must be returned."

From the foregoing, it is abundantly clear that even prior judicial scrutiny could not support the massive seizure which took place in the defendant's premises. It is also apparent that the seizure must follow the judicial scrutiny, not, as in the instant case, precede it.

If the decision in our Court of Appeals and in the United States Supreme Court in Heller, supra, was not sufficient to establish the clear principle, People v. Abronovitz, 31 N.Y.2d 160, 335 N.Y.S. 2d 279 (1972), 286 NE 2d 721 clearly does so. In that case, as in the instant case, a police officer brought before a judge certain magazines which he lawfully acquired, requesting that the judge issue a search warrant for the seizure of similar material possessed in and from the store. The warrant was issued and the police seized over 1,000 magazines and calendars from the defendant's premises while arresting the defendant on obscenity charges. Citing A Quantity of Books v. Kansas, 378 U.S. 205 (1964), and Marcus v. Property Search Warrant, 367 U.S. 717 (1961) as well as People v. Heller, supra, New York's Court of Appeals suppressed and reversed.

In the instant case, the only difference between the Abronovitz seizure and our seizure is that the judge accompanied the police officers in conducting

the warrantless search and seizure. In Abronovitz, there was a warrant issued by the judge preceding the search and seizure. In the instant case there was not even such a warrant. If it is the position of the People that the accompaniment of a judge in the making of an illegal search and seizure turns what would violate the Fourth Amendment into a constitutional procedure, such contention would indeed be novel.

The search warrant in the instant case directed the police officers to seize all copies of the two aforementioned films which the policeman had brought to the judge. During the course of the search of the petitioner's bookstore, with respect to more than one hundred items of expressive material, the police officers were directed by the judge to seize not one copy of each allegedly obscene film, book and magazine, but all copies. Clearly this is what this Court in A Quantity of Books and Marcus had in mind when it banned suppressive searches.

IV

AN INCOMPLETE SEARCH WARRANT ULTIMATELY COMPLETED AFTER THE SEARCH AND SEIZURE OF THE PETITIONER'S BOOKSTORE IS NO DIFFERENT THAN A GENERAL WARRANT. GENERAL WARRANTS HAVE ALWAYS BEEN PROHIBITED.

General warrants are prohibited by the Fourth Amendment. "The problem [posed by the general warrant] is not that of intrusion per se, but of a general exploratory rummaging in a person's belongings . . . [the Fourth Amendment addresses this problem] by requiring a par-

ticular description of the things to be seized." Andressen v. Maryland, 427 U.S. 463 (1976) quoting Coolidge v. New Hampshire, 407 U.S. 443 (1971). In Marcus v. Property Search Warrant, supra, Justice Brennan presented a history of the general warrant and demonstrated how it had been used by a tyrannical monarchy to deprive its citizenry of basic rights. In a footnote Justice Brennan illustrated how popular feelings in the late eighteenth century caused the general warrant to be abolished:

> "A contemporary London pamphlet (1764) summed up the widespread indignation against the use of the general warrant for the seizure of papers. 'In such a party-crime as a public libel, who can endure this assumed authority of taking all papers indiscriminately? . . . [W]here there is even a charge against one particular paper, to seize all, of every kind, is extravagant, unreasonable and inquisitorial. It is infamous in theory, and downright tyranny and despotism in practice.'" Marcus, supra, quoting "Father of Candor, a Letter Concerning Libels, Warrants and the Seizure of Papers," p. 48 (2nd ed. 1764, J. Almon Printer).

In the instant case the authority for the search and seizure was based on an incomplete search warrant which listed only the two aforementioned films. After the search and seizure in the petitioner's store was completed, all the confiscated materials were brought to the police

headquarters. Two typists were summoned to make an inventory of all confiscated materials. Once the list was completed, the other 788 items were added to the search warrant without Judge O'Connor being present. The People seem to suggest that on the strength of a warrant listing only two items, there is proper authority to seize 788 other items. In reality what the People are depending on for the authority for their search and seizure is a general warrant.

As mentioned before, when analyzing whether a particular search and seizure is legal, a higher standard of judicial scrutiny must be applied to items presumptively protected by the First Amendment. Obviously the same logic must hold true when examining the legitimacy of a search warrant:

> "In short . . . the constitutional requirement that warrants must particularly describe the things to be seized is to be accorded the most scrupulous exactitude when 'the things' are books, and the basis for their seizure is the ideas which they contain. . . . No less a standard could be faithful to First Amendment freedoms. The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case." Roaden v. Kentucky, 413 U.S. 496, 504 (1973) quoting Standford v. Texas, 379 U.S. 476, 505 (1965).

The search warrant used in the instant case did not meet these strict standards and therefore the authority on which the search and seizure was based was faulty.

In the nineteenth century the English Parliament saw the dangers of the general warrant. There is no question that these same dangers exist today.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the New York Court of Appeals.

Respectfully submitted,

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APPENDIX A

OPINION OF STATE OF NEW YORK, COUNTY OF ORANGE, LOCAL CRIMINAL COURT

STATE OF NEW YORK: COUNTY OF ORANGE
LOCAL CRIMINAL COURT: TOWN OF WAYWAYANDA
----------X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

LOJI SALES, INC.,

Defendant.

----------X

The defendant having moved for suppression of all evidence seized in a raid at the Adult Store, New Hampton, New York, a hearing was held to determine the issues raised. Upon completion of said hearing I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

On June 25th, 1976 at approximately 9:00 A.M., Mr. Johannes Hurbanek, an investigator with the B.C.I. met Town Justice John O'Connor at the District Attorney's office in Goshen, New York. Mr. Hurbanek showed Justice O'Connor two films he had previously purchased at the Adult Store. Mr. Hurbanek then made out an affidavit for the search warrant. Judge O'Connor issued the search warrant. Mr. Hurbanek thwn asked Judge O'Connor to accompany him to the Adult Book Store

to make Judicial determination of obscene material and to seize any said obscene material. At the intersection of Denton Hill Road and Route 17M in the Town of Waywayanda, they met with other police officers at which time Judge O'Connor signed the search warrant and also issued a warrant of arrest. At about 11.13 A.M. they entered the store. Mr. Hurbanek advised Mr. Mandakis of his rights and advised him that he was under arrest for Obscenity Second Degree. He was also advised that the officer had a search warrant and that Judge O'Connor was present to make a determination on all the material in the store. Mr. Mandakis offered to turn on the main switch so that Judge O'Connor could view the movies without putting any quarters into the machines. The Judge commenced to go into each booth and view each film while Mr. Hurbanek was taking notes for him. After Judge O'Connor viewed each film enough to make his determination, he ordered the film to be seized. They then went into the two rooms in the back of the building which each contained two separate films. Judge O'Connor viewed the films while Mr. Hurbanek took notes. The Judge ordered that these films also be seized. Judge O'Connor then started to view the magazines, books and newspaper type tablets that were out for sale. Some of the magazines and books had a cellophane wrapping on them and Judge O'Connor directed others in the detail to remove the wrappings so he could view the articles. After viewing the books and magazines he ordered them to be seized. Judge O'Connor followed this same procedure throughout each section of the store viewing each article as Mr. Hurbanek took notes and seized any item as

ordered by Judge O'Connor. The viewing and seizure of articles as Judge O'Connor directed was finished at approximately 5:00 P.M.

CONCLUSIONS OF LAW

I find that Town Justice O'Connor's viewing of each film, book and each piece of material to the extent that he was satisfied that there was reasonable cause to believe that said film, books and material was obscene within the definition of the Penal Law of New York State constituted a proper and adequate Judicial screening was required under (People vs. Heller 29 New York 2nd-319).

That the operator of the store, (Alexander B. Mandakis, Sr.) consented for Justice O'Connor to view each film without inserting any money.

Since Justice O'Connor only examined items that were on display racks, in open view to the public during business hours; after the manager (Alexander B. Mandakis, Sr.) was arrested on warrant; therefore, under People vs. Matherson the Judge could properly view, without buying any material.

That every item was seized pursuant to the search warrant signed by Town Justice John O'Connor; and only after Justice O'Connor independently determined that the seizure of each item was legal and proper.

That since the warrant entitled the defendant to an immediate adversary hearing, the defendant's rights to a neutral and detached determination of obscenity

and prompt, full adversary hearing on the same question of obscenity were not violated in any manner.

I find that there was no massive seizure of material, so that the store was not put out of business for any significant time.

I therefore conclude that all the procedures followed by the police and Justice O'Connor did not violate any of the defendant's constitutional or statutory rights.

Therefore, the defendant's motion to suppress the physical evidence is denied in each and every respect.

The foregoing constitutes the decision and order of the Court.

DATED: New Hampton, New York
November 13, 1976

S/ FRANK L. GIZA
Frank L. Giza
Town Justice
Town of Waywayanda

APPENDIX B

ORDER OF THE APPELLATE TERM

135-1978
March Term 1978

At a term of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts, held in Nassau County, on the 25th day of April, 1978.

Present-- Hon. Thomas P. Farley,
Presiding Justice
" " David L. Glickman
" " Mario Pittoni
Justices

The People of the State of New York
Respondent,
vs.
Lo-Ji Sales, Inc.
Appellant.

The above named Lo-Ji Sales, Inc. the defendant herein, appealed to this Court from a judgment of the Local Criminal Court, Town of Wawayanda, County of Orange rendered on the 3rd day of February 1977, convicting it of a violation of Section 235.05(1) Penal Law (three counts) and imposing sentence as follows:

Fine $1000 each count

and the said appeal having been submitted

by Herbert S. Kassner, Esq., of counsel for the appellant, and submitted by Richard L. Walker, Esq., of counsel for the respondent, and due deliberation having been had thereon;

It is hereby ordered and adjudged that the judgment of conviction so appealed from be, and the same is hereby, affirmed.

S/ DAVID L. BLICKMAN
Assoc. Justice, Appellate Term

APPENDIX C

APPLICATION FOR LEAVE TO APPEAL FILED AND DENIED BY THE NEW YORK COURT OF APPEALS

STATE OF NEW YORK
COURT OF APPEALS

Before: HON. LAWRENCE H. COOKE,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-against-

Lo-Ji Sales, Inc.,
Appellant.

CERTIFICATE DENYING LEAVE

I, LAWRENCE H. COOKE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
July 5, 1978

S/ Lawrence H. Cooke,
Associate Judge

*Description of Order: Order of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts, entered April 25, 1978, affirming a judgment of the Local Criminal Court, Town of Wawayanda, County of Orange, rendered February 2, 1977, convicting appellant of a violation of section 235.03 (1) of the Penal Law (three counts).

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.

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New York Statute

Penal Law

§ 235.05 Obscenity in the second degree.

A person is guilty of obscenity in the second degree when, knowing its content and character, he:

1. Promotes, or possesses with intent to promote, any obscene material; or

2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

Obscenity in the second degree is a class A misdemeanor.

As amended L.1969, c.583, § 2, eff. Sept. 1, 1969.